NO. 87-2071

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID RODRIQUEZ DIAZ, *et al*,

Petitioners,

v.

MEXICANA DE AVION, S.A., and
BOEING COMMERCIAL AIRPLANE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the District Court erred in dismissing the case due to Defendants' failure to sustain their forum non conveniens burden of proof in a case which includes:

   a. the deaths of United States citizens and foreigners;

   b. allegations of design defect in a United States manufactured and designed product;

   c. substantial sources of evidence, including after-accident investigative reports, witnesses and proof, in the United States; and

   d. jurisdiction over both Defendants in the United States.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rules 15.1(b) and 28.1, unsel for Petitioners certifies that the parties to this proceedings :

ALMA TORRE BLANCA de AGUILAR as Wife of David Alberto Aguilar Chavez, deceased

BOEING COMMERCIAL AIRPLANE COMPANY

DAVID RODRIQUEZ DIAZ as Husband of Imelda Zaldivar Moreno de Rodriguez, deceased and as Father of Marie Gabriela R. Zaldivar, deceased, and Anabel R. Zaldivar, deceased

ESPERANZA ESTAVILLO DIAZ and LUZ MA. ESTAVILLO DIAZ, as Daughters of Horacio Alfonso Estavillo Laguna, deceased, and Maria de la Luz Diaz de Estavillo, deceased, and as Sisters of Horacio Estavillo Diaz, deceased

MARIA DOLORES ROSALES DIAZ, as Daughter of Julia Diaz Cobian de Rosales, deceased, and Natael Gerardo Rosales Flores, deceased

MARIE CONCEPCION GOMEZ HERNANDEZ as Daughter of Jesus Gomez Hernandez, deceased, and Teresa Hernandez de Gomez, deceased

SUSAN GOLDRING as Executrix of the Estates of Jonathan M. Rivaud, deceased, and Peter J. Rivaud, deceased

CORONAL JESUS ERNESTO MERINO ORTEZ as Husband of Margarita del Toral Merino, deceased, and as Father of Monica Merino del Toral, deceased, Margarita Merino del Toral, deceased, and Marcela Merino del Toral, deceased

MEXICANA DE AVION, S.A.

NORA RIVAUD as Executrix of the Estates of John Michael Rivaud, deceased, and Yayone Rivaud, deceased

CAROLINA HUITRON ESPANOZA de YTARTE as Wife of Augustin Ytarte, deceased

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OPINIONS BELOW

The opinions of the District Court and the Appeals Court were not published but are set out hereto as Appendix A and B respectively.

JURISDICTION

The Court of Appeals for the Fifth Circuit originally entered judgment in this matter on March 22, 1988. Appendix B. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case invokes the Foreign Sovereign Immunities Act, 28 U.S.C. §1602, *et seq*.

STATEMENT OF THE CASE

This case was filed in Texas State District Court as a result of the crash of a Boeing 727 airline. On March 31, 1986, Mexicana Airlines Flight 940 crashed near Michoacan, Mexico. All 166 persons on board the aircraft died.

The day before the accident, the aircraft was located in Chicago. While in Chicago, the accident aircraft was serviced and maintained by agents or representatives of Mexicana . From Chicago, the aircraft was flown to Mexico City. On March 31, 1986, Mexicana Flight 940 took off from Mexico City with a final destination of Los Angeles, California with intermediate stops in Mexico. After take off, the aircraft climbed to the appropriate altitude. After the aircraft landing gear had retracted into the aircraft a tire exploded, which lead to a catastrophic wing failure and the crash.

Numerous United States resources, both public and private, were utilized to determine the causes of the crash. The

United States National Transportation Safety Board participated in the on-scene investigation of the crash. Those aircraft parts suspected of being a cause of the crash of this Boeing aircraft were sent to United States facilities for examination and analysis. One of the aircraft's four brake assemblies suspected of being a cause of the crash was sent to the facilities of the wheel and brake manufacturer in Ohio for examination. Other parts of the aircraft wreckage were sent to Boeing's Seattle, Washington, facility for examination, inspection and determination of their causal connection to the crash.

In response to this aircrash disaster, the United States Federal Aviation Administration issued a Notice of Proposed Rulemaking regarding Boeing 727 and other transport category aircraft. This Notice proposed an airworthiness directive relating to aircraft tire explosions. That Notice stated in pertinent part with regard to 727s that "a tire explosion in the wheel well during flight is suspected in a catastrophic loss of one airplane and severe damage to others." The "catastrophic loss" referred to is the crash of Mexicana Flight 940.

Of the individuals that died in the crash, ten were residents and/or citizens of the United States. Among the citizens and/or residents of the United States on board the accident aircraft were the following Plaintiffs' decedents: (1) John Rivaud; (2) Yayone Rivaud; (3) Jonathan Rivaud; (4) Peter Rivaud.

Defendants are Mexicana and Boeing. Boeing is a United States manufacturer and designer of aircraft. It is the manufacturer and designer of the Boeing 727 aircraft involved in this accident. Boeing is a major United States aerospace company

that maintains offices and employees throughout the United States.

Mexicana Airlines was the aircraft operator at the time of the accident. Mexicana is owned and/or controlled by the Mexican government. At the time of the crash of Mexicana Flight 940, Mexicana conducted its commercial operations internationally between Mexico and the United States pursuant to its United States Permit to Foreign Air Carrier. See Appendix C. The permit was issued by the United States Department of Transportation. The permit, among other things, allowed Mexicana to fly to Los Angeles, California, which was the final destination of Mexicana Flight 940. By accepting the permit, Mexicana waived any right it may have had to assert any defense of sovereign immunity from suit for any action or proceeding instituted against Mexicana in any court in the United States.

Plaintiffs filed this case for the deaths of their decedents in the State District Court of Bexar County, Texas, against Mexicana and Boeing. Mexicana removed the case to the United States District Court for the Western District of Texas based on the Foreign Sovereign Immunities Act. Boeing joined in the Petition for Removal. On January 23, 1987, the District Court entered an Order finding that jurisdiction existed, and granted Plaintiffs' motion for leave to file an amended complaint. The District Court then dismissed the case pursuant to the doctrine of forum non conveniens. Plaintiffs filed a Motion for Reconsideration of the District Court's January 23, 1987 Order. On April 17, 1987, the District Court denied Plaintiffs' Motion for Reconsideration. Plaintiffs timely filed Notice of Appeal to the United States Court of Appeals for the Fifth Circuit. On March 22, 1988, the United

States Court of Appeal for the Fifth Circuit affirmed the Judgment of the District Court.

REASON FOR GRANTING THE WRIT

I.

In making a forum non conveniens determination, the district court should afford substantial weight to plaintiff's choice of forum, and such choice of forum should rarely be disturbed. *Gulf Oil v. Gilbert*, 330 U.S. 501 (1944). An American citizen's choice of an American forum is entitled to even greater deference than a foreign plaintiff's selection of an American forum. *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 255-256 (1981). Forum non conveniens dismissal of the present case denies the Plaintiffs, who include representatives of American decedents, their right to bring a lawsuit in an American court.

The Court of Appeals, in affirming the District Court's judgment, cited *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981) for the proposition that the presence of a United States citizen as a plaintiff is not dispositive. See Appendix A. However, in the *Reyno* case the plaintiff's decedents were all Scottish citizens. In the present case, Plaintiffs' decedents include United States citizens and residents. The opinion of the Appeals Court in this case is inconsistent with other Fifth Circuit decisions which held that only in rare cases should a plaintiff's choice of forum be disturbed. *In Re: Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987), *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159 (5th Cir. 1987)

II.

The Defendant bears the burden of proof in any forum non conveniens analysis. This requires that Defendant show that both public and private interest factors establish that the alternative forum is more convenient to all parties involved. See *Gulf Oil v. Gilbert,* 330 U.S. 501, 510 (1944). The private and public interest factors establish that the United States forum, the Plaintiffs' choice of forum, was proper and should not be disturbed.

Evidence submitted to the District Court regarding the private interest factors included the following: The sources of proof regarding the design and manufacture of the accident aircraft and the aircraft components suspected of causing the crash are in the United States, not Mexico. Boeing designed, manufactured, and sold the Boeing 727 accident aircraft in the United States. Boeing issued servicing, maintenance, operating instructions, and warnings on the Boeing 727 accident aircraft from the United States. No component in issue, or any part of the Boeing 727 accident aircraft suspected of causing this accident, was designed or manufactured in Mexico. The individuals who are responsible for the design and manufacture of this aircraft and the component parts that are suspected of playing a part in causing this accident are in the United States, not Mexico.

Additionally, evidence presented to the District Court established the accident aircraft and the aircraft components in issue in this case were designed in the United States pursuant to United States laws, standards and regulations. The individuals that are familiar with the design standards, laws, and regulations applicable to this U.S. designed aircraft are in the United States

and are employed by U.S. companies such as Boeing, as well as U.S. governmental agencies such as the U.S. Federal Aviation Administration.

Most of the evidence regarding the actionable negligence and product deficiencies with regard to the crash of Mexicana Flight 940 occurred in the United States. This includes not only the design of the aircraft and aircraft components by Boeing and other U.S. sub-component manufacturers, but also the operation, inspection, and maintenance of the accident aircraft that occurred in the United States. Mexicana operated the accident aircraft extensively in the United States. As was previously mentioned, the day before this accident, the aircraft was being serviced and operated by Mexicana out of Chicago. Many sources of proof regarding the actionable negligence and product deficiencies of Defendants which are essential to the present cause of action are located in the United States, not Mexico.

Additionally, U.S. technical and investigative experts and facilities in the U.S. were extensively utilized in the accident investigation. The U.S. National Transportation Safety Board participated in the on-scene investigation. Aircraft parts suspected of causing the crash were sent to the United States for analysis. These parts were examined and inspected by U.S. investigative and technical personnel employed by U.S. companies like Boeing and Goodrich at U.S. facilities. U.S. investigative and technical personnel, who actually examined component parts suspected of causing the crash, are available in the U.S., not Mexico. The evidence establishes that the private interest factors dictates that the case be maintained before a United States forum.

With regard to the public interest factor, this country's public interest in this accident was recognized shortly after this accident occurred. The U.S. Federal Aviation Administration issued a Notice of Proposed Rulemaking proposing the consideration of an airworthiness directive. The Notice of Proposed Rulemaking issued by FAA prepared an order requiring that tires of approximately 3,200 heavy jet transport aircraft in the United States fleet be fitted with nitrogen instead of air. A direct reason for the order was the crash of Mexicana Flight 940. This action recognizes the public interest of this country in a U.S. designed and manufactured product used extensively in air transportation in this country. Those individuals, who issued the Notice of Proposed Rulemaking, considered the responses to the Notice, and made determinations regarding the Notice, are available as witnesses in the United States, not Mexico. Additionally, Plaintiffs have agreed to bring any Plaintiff or member of a Plaintiffs decedent's family residing in Mexico to the United States for deposition and trial without expense to the Defendants.

A review of the factors or considerations as set out in the *Gulf Oil* and *Piper* cases establishes that Defendants in this matter have failed to sustain their burden of proof under the facts of this case.

III.

The Defendants failed to sustain their burden of proving that Mexico as an alternative forum was both available and adequate. In a forum non conveniens analysis, it must first be decided whether the alternative forum is both available and adequate. The Court of Appeals opinion is devoid of any

discussion as to whether Mexico is an available and adequate forum. The alternate forum is available when the entire case and parties can come within the jurisdiction of that forum. The alternate forum is adequate when the parties will not be deprived of all remedies or be treated unfairly. See *In Re Air Crash Disaster Near New Orleans, La.*, supra at 1165.

When the District Court allowed Defendants' motion to dismiss the present case based upon the doctrine of forum non conveniens, it conditioned the dismissal. Among the conditions of dismissal were requirements that Boeing submit to service of process and jurisdiction in the appropriate court in Mexico. The Defendant must establish the existence of at least two forums in which all the Defendants are amenable to process. *In Re Air Crash Disaster Near New Orleans, La.*, at 1164. The Defendant must establish that the foreign court will take jurisdiction of the transferred case. *Syndicate 420 at Lloyd's London v. Early American Insurance Co.*, 796 F.2d 821 (5th Cir. 1986). The proper analysis requires that the District Court focus on the foreign court's willingness to take jurisdiction of the case and not the Defendant's willingness to submit to the foreign court's jurisdiction. Boeing provided no proof to the District Court of a Mexican court's willingness to take jurisdiction of a case involving Boeing. Failure to prove this condition of available jurisdiction in the foreign forum makes the remaining conditions of dismissal meaningless. See Appendix A.

It must also be established that the alternative forum is adequate. The finding by the District Court that the Mexican forum is adequate is clearly erroneous. No adequate forum exists where it appears that the Plaintiffs would "be deprived of any

remedy or will be treated unfairly" in the alternative forum. See *Syndicate 420* at 829 quoting *Piper* at 255. Mexico does not grant a cause of action to relatives of the victims of the air crash against the manufacturer. The cause of action would be applicable only against Defendant Mexicana. Additionally, due to the codified nature of Mexican damage law, any recovery by the Plaintiffs would be so unjust as to amount to the Plaintiffs being treated unfairly. The Defendants failed to establish that the Mexican forum was either an available or adequate forum.

CONCLUSION

For the reasons set forth, it is respectfully submitted that this Petition for Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

DAVID RODRIGUEZ DIAZ, ET AL	*	
	*	
Plaintiffs	*	
	*	
VS.	*	
	*	SA-86-CA-1065
MEXICANA de AVION, S.A., and	*	
BOEING COMMERCIAL AIRPLANE	*	
COMPANY,	*	
	*	
Defendants	*	

ORDER

This lawsuit arises out of the crash of Mexicana Airlines Flight 940 on March 31, 1986 in the mountains west of Mexico City, Mexico. The case was originally filed in Texas District Court by eight of the survivors and estate representatives of persons killed in the crash. Mexicana filed its petition for removal to this court pursuant to the Foreign Sovereign Immunities Act, Title 28 U.S.C. Section 1602 et seq. Such a removal is effective as to Boeing. In any event, Boeing has asserted an independent jurisdictional basis under Title 28 U.S.C. Section 1332(a)(2). The FSIA provides that an agency or instrumentality of a foreign state, such as Mexicana, is immune from the jurisdiction of the courts of the United States unless one or more of the general exceptions to jurisdictional immunity applies. Mexicana has filed a motion to dismiss for lack of jurisdiction, claiming that none of

the exceptions in section 1605 applies. Boeing has filed a motion to dismiss for failure to state a claim and a motion to dismiss based on the doctrine of forum non conveniens. While generally a federal court must first determine the existence vel non of jurisdiction before analyzing the forum non conveniens issue, where the jurisdictional issue affects less than all defendants and resolution of the forum non conveniens issue is equally applicable to all defendants, the latter issue can be examined first. *Syndicate 420 at Lloyd's London v. Early American Insurance Company*, 796 F.2d 821, 826 n.8 (5th Cir. 1986). This Court has examined the jurisdictional issue and is of the opinion that jurisdiction does exist. However, because the Court believes that this forum is not appropriate, which determination is dispositive of all parties and all issues, a written order containing the reasoning for this Court's belief that jurisdiction exists shall not be entered.

Also pending before the Court is plaintiffs' motion for leave to file their first amended complaint. The original petition was filed in state court by eight citizens of Mexico, stating causes of action against both defendants for negligence and products liability. In their amended complaint, plaintiffs drop their allegation of negligence as to Boeing and their cause of action for strict liability against Mexicana. They also seek to add a claim for the deaths in the crash of four United States citizens in the same family. Rule 15(a) of the Federal Rules of Civil Procedure provide that leave to file an amended complaint shall be freely given when justice so requires. The Court will, therefore, grant plaintiffs' motion.

The first step in an analysis of the forum non conveniens issue is to determine whether there exists an adequate and available alternative forum for resolution of the dispute.

Syndicate 420, at 828. The defendant has the burden of proving that an adequate and available alternative forum exists. *Perusahaan Umum Listrick Negara v. M/V Tel Aviv*, 711 F.2d 1231, 1238 (5th Cir. 1983). Boeing contends that Mexico provides such a forum. In response, plaintiffs claim that because of the relationship between Mexicana and Mexico, which owns the majority of Mexicana shares, trial there will be delayed for years. Plaintiffs provide no support for this allegation. They also contend that it will be difficult to obtain jurisdiction over Boeing in Mexico. Boeing has agreed that this Court may condition its dismissal on defendants' agreement to submit themselves to the jurisdiction of the Mexican courts. Finally, plaintiffs state that since acts in the United States give rise to their claims of negligence and products liability, that proof for these claims is in the United States. Since the Court intends to further condition dismissal upon defendants' agreement to make all relevant witnesses available in the Mexican proceeding or for deposition, and to make available any documents within their control, this objection is without merit. Additionally, as will be noted more fully below, any acts of negligence which contributed to the crash of Flight 940 occurred in Mexico as well as the United States.

Though not cited by plaintiffs as a reason to oppose a Mexican forum, the Court feels it is appropriate to address the issue of the law to be applied in this case. Application of the Texas conflict of laws principals indicates that Mexican law should apply to this case. In all conflicts cases sounding in tort, the Texas courts apply the law of the forum with the most significant relationship to the occurrence and the parties. *Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979). *Duncan v. Cessna Aircraft Company*, 665 S.W.2d 414, 421 (Tex. 1984).

The most significant relationship test is applied to wrongful death cases. *Total Oil Field Services, Inc. v. Garcia,* 711 S.W.2d 237 (Tex. 1986). The relevant contacts to be considered in determining which forum has the most significant relationship are: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship between the parties is centered. The injury in the case at bar occurred in Mexico. In their amended complaint, plaintiffs allege that Mexicana was negligent in the manner in which it inspected, operated, maintained and serviced the aircraft in the United States and Mexico. While plaintiffs do not allege with any specificity what caused the accident or what negligent acts Mexicana committed in the United States, it appears from the evidence attached to the pleadings that the crash was caused by the explosion of a tire shortly after take-off. Apparently, drag on the brakes on one set of landing gear during take-off caused the tire, which was filled with air, to overheat and explode. The airplane had been in Chicago, Illinois the day before the accident. While Mexicana may have been negligent in failing to properly inspect, operate, maintain and service the aircraft in the United States, the more immediate negligence, if any, arose from its failure to properly inspect, operate, maintain and service the aircraft in Mexico City. Therefore, while, as to the products liability claim the conduct causing the injury occurred in the United States where the plane was designed and manufactured, any acts of negligence by Mexicana occurred in Mexico as well as the United States. The domicile and residence of the original plaintiffs is in Mexico; they are Mexican citizens. Mexicana is incorporated in Mexico

and has its principal place of business there. The representatives of the U.S. family which died in the crash are U.S. citizens, and reside here. The fact that other U.S. citizens were on the airplane is irrelevant. Boeing is incorporated in the United States and does business here, as does Mexicana. The relationship between all the plaintiffs and the defendants is centered in Mexico. All of the plaintiffs' decedents purchased their tickets in Mexico City for the flight to Puerto Vallarta, Mexico. While plaintiffs refer to the United States Permit to Foreign Air Carrier issued to Mexicana, it is clear that permit is unnecessary for flights wholly within Mexico and is no evidence of U.S. involvement in this flight. Consideration of these factors indicates that Mexico has the most significant relationship to the occurrence and the parties, and that Mexican law should apply. The Texas Supreme Court in *Gutierrez v. Collins* stated that while the laws of Texas and Mexico differ in several aspects, these differences do not render Mexican laws violative of public policy. There is a presumption that the substantive law of a foreign forum is adequate. *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 392 (5th Cir. 1983).

Even if Mexican law is less favorable, the factor does not warrant retention of this case. In *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981), the United States Supreme Court held that plaintiffs may not defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. *Id.* at 247, 102 S.Ct. at 261. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the forum non conveniens inquiry. *Ibid. Syndicate 420*, at 829. In *Piper*, the

Supreme Court determined that the unavailability of strict liability as a theory of recovery was insufficient to render a Scottish forum inadequate for the resolution of a products liability action.

In the case at bar, plaintiffs have not contended that Mexican laws make a Mexican forum inadequate. There is certainly no indication that the remedy provided by the Mexican forum would be so clearly inadequate or unsatisfactory that it would be no remedy at all. *See, Piper*, at 254, 102 S.Ct. at 265. Even if U.S. law were to apply to some aspect of this case, that factor would not require that the case be retained in the U.S. when the forum non conveniens analysis demonstrates, as it does here, that the U.S. is an inconvenient forum. *Ali v. Offshore Co.*, 753 F.2d 1327, 1333 (5th Cir. 1985). This Court concludes, therefore, that Mexicana is an adequate forum for the resolution of this case.

In addition to being adequate, the forum must also be available. The defendant's submission to the jurisdiction of an alternative forum renders that forum available for purposes of the forum non conveniens analysis. *Syndicate 420*, at 830. As indicated above, Boeing is willing to submit to the jurisdiction of the Mexican courts. Dismissal herein will be conditioned upon submission to service of process and jurisdiction in the appropriate Mexican court. It will also be conditioned upon defendants' waiver of any statute of limitations defense that has matured since the commencement of this action. Plaintiffs have offered nothing to indicate that a Mexican forum is unavailable.

Having determined that an adequate, available forum exists, the next step is to proceed to a balancing of the public and private interest factors. *Syndicate 420*, at 828. These factors were first set forth in *Gulf Oil Corporation vs. Gilbert*, 330 U.S.

501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). Unless the balance of these factors is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. *Id.* at 508, 67 S.Ct. at 843. This presumption applies with less force, however, when the plaintiffs are foreign. *Piper*, at 225, 102 S.Ct. at 266. Here, all of the original plaintiffs are residents and citizens of Mexico. Although there is now a U.S. citizen plaintiff, this addition was made only after it was pointed out in Mexicana's motion to dismiss for lack of jurisdiction that this case has very little nexus with the United States. Because all of the plaintiffs who originally chose this forum are Mexican citizens, the Court believes that it is appropriate to afford less weight to their choice of forum.

Important private interest considerations are: (1) the relative ease to access to sources of proof, (2) the availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses, (3) the possibility of view of the premises, if view would be appropriate to the action, and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. *Gulf Oil*, at 508, 67 S.Ct. at 843. The Court believes that access to the sources of proof in this case are more readily available in Mexico than in the United States. The investigation of the crash is being conducted by the Direccion General de Aeronautica Civil (DGAC), a government agency of Mexico headquartered in Mexico City. It will issue a public report when its investigation is completed. While investigators from the National Transportation Safety Board visited the crash scene, they did not conduct any substantial investigation and will not issue a report. The investigation of a major aviation disaster, such as the crash of Mexicana Flight 940 involves the analysis of numerous

items of information. These items include statements obtained from the survivors and eyewitnesses, if any, and air traffic controllers; photographs of the crash site, wreckage and aircraft components; physical evidence recovered from the crash site; information from the cockpit voice recorder and the flight data recorder; the results of tests performed on aircraft components; the tapes and transcripts of communications between the aircraft and air traffic controllers; radar information on the location of the aircraft at various times; and manuals and maintenance, training, and other records from the aircraft operator. All of this evidence is or will be in Mexico. While the landing gear assembly was examined by B. F. Goodrich in the United States and while Boeing also examined certain pieces of the aircraft, these parts will be returned to the DGAC and any reports stemming from these examinations will be incorporated in the DGAC investigation. It appears that the drag in the brakes could have been related to a leak in the hydraulic unit in the system. This unit had recently been installed in Mexico City during an overhaul of the aircraft. All of the witnesses and records relating to the maintenance and operation of the aircraft are in Mexico where the routine maintenance is performed. Eyewitnesses to the crash are also located in Mexico. The limitation of this Court's subpoena power makes it unlikely that this Court could compel the attendance of any of the witnesses from Mexico at the trial of this case here. Defendant has submitted evidence that any attempt to obtain discovery in Mexico in aid of the litigation here would be very difficult and time consuming. Though Boeing and Mexicana may have witnesses in the United States who are necessary for trial, the conditioning of this dismissal upon defendants' agreement to make these witnesses available in the Mexican

proceeding eliminates any problem of access plaintiffs might have to these sources of proof. In any event, the fact that the airplane was designed and manufactured here does not mandate that the trial take place in the United States. *Piper*, at 257-258, 102 S.Ct. at 267. While it does not appear that it will be necessary to view the crash site, if that does become necessary, it can obviously only take place in Mexico. In addition to the fact that most of the proof regarding liability exists in Mexico, since most of the plaintiffs are Mexican residents and citizens, proof of damages is located there as well.

Factors of public interest also bear on the application of the forum non conveniens doctrine. *Gulf Oil*, at 508, 67 S.Ct. at 843. The administrative difficulties flowing from court congestion are substantial. This Court has a responsibility of 50% of the criminal cases filed in the San Antonio Division of the Western District of Texas, not to mention its share of the civil docket. Boeing has suggested that the trial of this case would be lengthy. Such a burden ought not to be imposed upon this Court when this community has virtually no relation to this litigation. *Ibid.* That there is a local interest in having localized controversies decided at home weighs in favor of dismissal. Most of the plaintiffs are Mexican citizens, Mexicana Airlines is incorporated in Mexico, and the crash occurred in Mexico *See, Piper*, at 260, 102 S.Ct. at 268. As noted above, it appears that Mexican law should be applied to this lawsuit. It is more appropriate for a Mexican court to apply that law than for this Court to do so.

Having determined that an adequate and available alternative forum exists, and having weighed the public and private interests concerned, this Court is of the opinion that

dismissal based on forum non conveniens is appropriate. This case involves the crash of a Mexican airline on a flight between two points within Mexico and involving mostly Mexican plaintiffs. Although there is a U.S. plaintiff, this Court retains its discretion to decline, after considering the *Gulf Oil* factors, to hear this action though the alternative forum is a Mexican court. *Pacific Employers Insurance Company v. M/V Captain W. D. Cargill*, 751 F.2d 801, 805 (5th Cir. 1985). Most of the witnesses and evidence pertaining to the crash are located in Mexico, and any evidence in the United States can be provided to the Mexican court. Most of the discussion above has centered on the question of whether a United States or a Mexican forum is appropriate. What has only been briefly mentioned above and which is conspicuous by its absence, is the connection of this case to Texas. Other than the fact that Mexicana does business here and the fact that plaintiffs' attorneys have their offices here, this lawsuit has no nexus to this forum. Dismissal as to both defendants is appropriate.

Dismissal of this case is premised upon the following conditions: (1) that defendants submit to service of process and jurisdiction in the appropriate court in Mexico, (2) that defendants formally waive in the Mexican proceeding any statute of limitations defense that has matured since the commencement of this action, (3) that defendants formally agree in the Mexican forum to make available in the Mexican proceeding all relevant witnesses, or in lieu thereof, to schedule depositions at a reasonable time and place, and to make available any documents within their control, and that any depositions, answers to interrogatories, request for admissions and the like filed herein may be used in the foreign proceeding to the same extent as if they

had originated therein, and (4) that defendants formally agree in the Mexican forum to satisfy any final judgment. Should defendants fail to meet any of these conditions, this Court will resume jurisdiction over this case. *Ali*, at 1334 n.16.

It is, therefore, ORDERED that plaintiffs' motion for leave to amend their complaint be, and it hereby is, GRANTED.

It is further ORDERED that Boeing's motion to dismiss be, and it hereby is, GRANTED.

SIGNED this 23rd day of January, 1987.

/s/_____
H. F. GARCIA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

DAVID RODRIGUEZ DIAZ, ET AL	*	
	*	
Plaintiffs	*	
	*	
VS.	*	
	*	SA-86-CA-1065
MEXICANA de AVION, S.A., and	*	
BOEING COMMERCIAL AIRPLANE	*	
COMPANY,	*	
	*	
Defendants	*	

JUDGMENT

In accordance with the Order being entered contemporaneously herewith;

It is ORDERED that the above-entitled and numbered cause be, and it hereby is, DISMISSED without prejudice. All costs are taxed against plaintiffs.

SIGNED this 23rd day of January, 1987.

/s/_____
H. F. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-5542
Summary Calendar

DAVID RODRIGUEZ, ET AL.

Plaintiffs-Appellants,

versus

MEXICAN DEAVION, S.A., and
BOEING COMERCIAL AIRPLANE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas
(SA-86-CA-1065)

(March 22, 1988)

Before REAVLEY, KING and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

The plaintiff class in this case appeals the district court's dismissal based on forum non conveniens grounds. We hold the dismissal within the district court's discretion and affirm.

I.

In 1986, a Boeing 727 airliner owned and operated by Compania Mexicana de Aviacion, S.A., de C.V. ("Mexicana") crashed in Mexico while en route from Mexico City to Puerto Vallarta. This lawsuit was originally filed in state court in Bexar County, Texas, by the personal representatives of sixteen Mexican nationals killed in the crash. The case was removed to federal court by Mexicana pursuant to the Foreign Sovereign Immunities Act. The plaintiffs thereafter amended their complaint to join as plaintiffs the personal representatives of four decedents alleged to be citizens of the United States.

After Boeing filed a motion to dismiss on the ground of forum non conveniens, the district court granted the motion, making the dismissal subject to the following conditions: (a) that the defendants submit to service of process and jurisdiction in the appropriate court in Mexico; (2) that the defendants formally waive in the Mexican proceeding any statute of limitations defense that had matured since the commencement of this action; (3) that the defendants make available all relevant witnesses and documents; and (4) that the defendants agree to satisfy any judgment rendered by the Mexican court. The defendants agreed to these conditions.

II

A.

A forum non conveniens determination is a matter that traditionally has been in the province of the trial court's discretion.

In Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419(1981), the Supreme Court delineated the standard of review to be applied by the courts of appeals:

> The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.

Id. at 257.

Although the plaintiff's choice of forum should not ordinarily be disturbed, the doctrine of forum non conveniens permits a court to resist imposition upon its jurisdiction even when subject matter jurisdiction is conferred by statute or personal jurisdiction is conferred by minimum contacts or consent. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.C. 839, 91 L.Ed. 1055 (1947). In determining whether a particular forum is appropriate, the court must balance the private interests of the litigants as well as the public interests of the chosen forum. Id.

The private interests to be considered include: (i) relative ease of access to sources of proof; (ii) availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; (iii) possibility of a view of premises, if a view could be appropriate to the action; (iv) all other practical problems that make trial of a case easy, expeditious, and inexpensive; and (v) enforceability of a judgment if one is obtained. Id.

The public interest factors include: (i) the administrative difficulties flowing from court congestion; (ii) the local interest in having localized controversies resolved at home; (iii) the interest

in trying a case in a forum that is familiar with the law that governs the action; (iv) the avoidance of unnecessary problems and conflicts of law, or an application of foreign law; and (v) the unfairness of burdening citizens in an unrelated forum with jury duty. Id. at 510.

An evaluation of the private and public interest facts set forth in Gilbert demonstrate that dismissal of the complaint in this case on forum non conveniens grounds was within the district court's discretion. As that court pointed out, the relevant evidence concerning potential liability is located predominately in Mexico. Among the significant sources of proof located in Mexico is the work product of the Mexican accident investigation, including the records of the accident aircraft, statements of eye-witnesses and air traffic controllers, the wreckage and other physical evidence from the crash site, results of tests performed on aircraft components, and the records relating to communications between the Mexicana flight crew and air traffic controllers. Additionally, since most of the plaintiffs are Mexican citizens, evidence and witnesses concerning damage issues also will be located in Mexico. The district court correctly focused on the quantity and type of evidence that will be relevant to the determination of fault and found that that the majority of relevant evidence concerning potential liability is located in Mexico.[1]

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[1]Plaintiffs argue that evidence with respect to the manufacture and design of the Boeing aircraft is present in the United States. This factor alone does not compel retention of the case in the United States. See Nai-Chao v. Boeing Co., 555 F.Supp. 9, 17-18 (N.D. Cal. 1982), aff'd 708 F.2d 1406 (9th Cir.), cert. denied, 464 U.S. 1017 (1983). See also Jennings v. Boeing Co. 660 F.Supp. 796, 805 (E.D. Pa. 1987).

Moreover, proceeding with the litigation in Texas would unnecessarily burden the parties. Witnesses located in Mexico are outside the jurisdiction of the Texas federal district court and could not be compelled to testify. Even if witnesses were willing to testify, it would be expensive to transport the witnesses to Texas.

The plaintiffs argue that because their class includes the representatives of three United States citizens and one United States resident, their choice of the United States forum should prevail. We note, however, that the presence of a United States citizen as a plaintiff is not dispositive. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.23 (1981). The district court must, and did, weigh all the factors, giving somewhat more weight to a citizen's or resident's choice of forum than to that of a foreign plaintiff. Here, the United States citizens were far outnumbered in the class by Mexican nationals. Furthermore, they constituted one family who had moved to the United States from Mexico, and still maintained strong ties there. They were spending an extended period of time in Mexico and had bought their tickets for this internal Mexican flight in Mexico. Furthermore, their representatives were added as plaintiffs after the choice of forum had been made. Thus, we do not find that the presence in this lawsuit outweighs the district court's careful consideration of all the public and private interests at stake.

The Gilbert "public interests" factors also point to Mexico as the convenient forum. The district court noted that its docket is congested and retention of the lawsuit would cause administrative difficulty. This action chiefly involves Mexican plaintiffs and arises from the crash of a Mexican airliner in Mexico during an intra-Mexico flight. Mexico has a "paramount interest" in the

outcome fo this lawsuit. Additionally, the fact that Mexican law should govern this controversy strongly supports the district court's dismissal on forum non conveniens grounds.[2]

The district court did not abuse its discretion in holding that when the practical problems and evidence in this case were considered, the case could most expeditiously and inexpensively be tried in Mexico.[3]

B.

The plaintiffs claim that the district court erred in dismissing this case on forum non conveniens grounds without allowing discovery. The district court convincingly and succinctly rejected the plaintiffs' denial of discovery claim based on a careful review of the record.

> The record reveals that the motion to dismiss [on forum non conveniens] grounds was filed November 12, 1986. Shortly thereafter, plaintiffs requested leave to submit in excess of twenty interrogatories to defendants but did not assert the pending motion as a basis for the additional discovery. On December 5th, Boeing filed a motion to stay discovery. The motion sought a

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[2]Following the choice-of-law principles of the forum state, Texas, this court is required to apply the "significant relationship" test. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984); Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979). See also Kucel v. Walter E. Heller & Co., 813 F.2d 67, 73 (5th Cir. 1987). The district court properly concluded that Mexico has the most significant relationship to the occurrence in question and that Mexican law governs this case.

[3]The possibility that Mexican law may be less favorable than American law to plaintiffs, as the plaintiffs contend, is not a reason for denying a motion to dismiss on forum non conveniens grounds. Piper Aircraft, 454 U.S. at 250; Syndicate 420 at Lloyd's London v. Early American Ins. Co., 796 F.2d 821, 829 (5th Cir. 1986).

> restraint of discovery as to plaintiffs' substantive claims but not as to the forum non conveniens issue. In fact, counsel for Boeing offered to arrange the deposition of a witness on that issue. Plaintiffs' memorandum in opposition to Boeing's motion to dismiss, filed almost two months after the motions and well beyond the ten day limit set in the Local Rules, made no mention of the need for discovery. Plaintiffs have never moved to compel the answers to any interrogatories or the production of any documents related to the forum non conveniens issue. The complaint regarding the denial of discovery is without merit.

The Second Circuit recently disposed of a similar contention in a forum non conveniens context. In Transunion Corp. v. Pepsico, 811 F.2d 127 (2d Cir. 1987), the plaintiff argued that the district court abused its discretion in granting a protective order to prevent further discovery prior to a decision on the defendant's motion to dismiss on forum non conveniens founds. The Second Circuit held that "[m]otions to dismiss for forum non conveniens may be decided on the basis of affidavits." Id. at 130.

All the information necessary for the district court to decide the forum non conveniens motion was before the court in the form of affidavits. Requiring additional extensive discovery would defeat the purpose of a motion to dismiss on forum non conveniens grounds. Piper Aircraft, 454 F.2d 1147 at 828; In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1164 (5th Cir. 1987). Moreover, the plaintiffs have failed to identify what information they would have developed through discovery that could have significantly affected the private and public interest analysis.

C.

The plaintiffs state that in a case arising from the same air crash as that in this case, Central District of California in Penasco v. Compania Mexicana de Aviacion, S.A., (C.D. Calif. No. CV-87-5265 R), the district court denied the defendants' motion to dismiss on forum non conveniens grounds. The plaintiffs therefore seek in the alternative a reversal with instructions that the San Antonio district court transfer the San Antonio cases to Los Angeles pursuant to 28 U.S.C. § 1401(a). We do not find the California proceedings relevant to our decision whether the Texas district court abused its discretion in dismissing this case on forum non conveniens grounds. The point of leaving some discretion to the trial judge is that he has a range of options and on review we, as a court of appeals, evaluate whether the decision was reasoned within that range. Furthermore, we note that the California case had considerable differences from ours, including the fact that Boeing was dismissed as a defendant from that case. Finally, if we were to consider other district court opinions arising from the same crash, we could just as well look to Carlos Penasco Garcia v. Mexicana de Avio, 87 C 3920 (N.D. Ill. Sept. 23, 1987), which the district court dismissed on forum non conveniens grounds referring to "the well reasoned opinion" in this case.

III

For the above reasons, the judgment of the district court is

AFFIRMED.

APPENDIX C

Issued by
Order 78-6-121

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

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PERMIT TO FOREIGN AIR CARRIER
(as amended)

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COMPANIA MEXICANA DE AVIACION, S.A.

is authorized, subject to the following provisions, the provisions of the Federal Aviation Act of 1958, and the orders, rules, and regulations issued under it, to engage in foreign air transportation of persons, property, and mail, as follows:

(1) Between the coterminal points Mexico City, Acapulco, Guadalajara, Puerto Vallarta, Mazatlan, Mexicali, and Hermosillo, Mexico, and the coterminal points Los Angeles, San Francisco, and Oakland, California, and Seattle, Washington;

(2) Between the coterminal points Mexico City, Guadalajara, Cuidad Juarez, Acapulco, Zihuatanejo, Manzanillo, Puerto Vallarta, Mazatlan, San Jose del Cabo, La Paz, and Loreto, Mexico, and the terminal point Denver, Colorado;

(3) Between the coterminal points Mexico City, Acapulco, Guadalajara, Zihuatanejo, Manzanillo, Puerto Vallarta, Mazatlan, San Jose del Cabo, La Paz, Loreto, Oaxaca, Monterrey, and Tampico, Mexico, and the coterminal points Harlingen, San Antonio, and Dallas/Fort Worth, Texas, and Memphis, Tennessee;

(4) Between the coterminal points Guadalajara, Manzanillo, Puerto Vallarta, Mazatlan, San Jose del Cabo, La Paz, and Loreto, Mexico, and the terminal point Chicago, Illinois;

(5) Between the coterminal points Mexico City, Acapulco, Oaxaca, Zihuatanejo, and Monterrey, Mexico, and the coterminal points Kansas City and St. Louis, Missouri, Chicago, Illinois, and Minneapolis/St. Paul, Minnesota, and beyond any of the U.S. coterminals to Toronto and Montreal, Canada;

(6) Between the coterminal points Mexico City, Acapulco, Guadalajara, Zihuatanejo, Manzanillo, Puerto Vallarta, Mazatlan, San Jose del Cabo, La Paz, and Loreto, Mexico, and the terminal point Atlanta, Georgia;

(7) Between the coterminal points Mexico City, Acapulco, Guadalajara, and Monterrey, Mexico, and the coterminal points Detroit, Michigan, Cleveland, Ohio, Washington, D.C./Baltimore, Maryland, and Philadelphia, Pennsylvania, and beyond any of the U.S. coterminals to Toronto and Montreal, Canada;

(8) Between the coterminal points Mexico City, Merida, Cozumel, and Punta Cancun, Mexico, and the terminal point San Juan, Puerto Rico;

(9) Between the coterminal points Cozumel, and Punta Cancun, Mexico, and the terminal point Miami, Florida;

(10) Between the coterminal points Mexico City, Merida, Cozumel, and Punta Cancun, Mexico, and the terminal point Tampa, Florida;

(11) Between the coterminal points Merida, Cozumel, and Punta Cancun, Mexico, and the terminal point Dallas/Fort Worth, Texas;

(12) Between the coterminal points Merida, Cozumel, and Punta Cancun, Mexico, and the coterminal points Chicago, Illinois, and Minneapolis/St. Paul, Minnesota; and

(13) Between the coterminal points Merida, Cozumel, and Punta Cancun, Mexico, and the coterminal

points Detroit, Michigan, Cleveland, Ohio, and Philadelphia, Pennsylvania.

The holder shall be authorized to engage in charter trips in foreign air transportation, subject to the terms, conditions, and limitations prescribed by Part 212 of the Board's Economic Regulations.

This permit shall be subject to the condition that on routes 5 and 7 any flight which serves a point beyond the United States shall originate or terminate at a point in Mexico.

The holder shall conform to the airworthiness and airman competency requirements prescribed by the Government of Mexico for Mexican international air service.

This permit shall be subject to all applicable provisions of any treaty, convention, or agreement affecting international air transportation now in effect, or that may become effective during the period this permit remains in effect, to which the United States and Mexico shall be parties.

The holder shall keep on deposit with the Board a signed counterpart of CAB Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol approved by Board Order E-23680, May 13, 1966, and a signed counterpart of any amendment or amendments to such agreement which may be approved by the Board and to which the holder becomes a party.

The holder (1) shall not provide foreign air transportation under this permit unless there is in effect third-party liability insurance in the amount of $1,000,000 or more to meet potential liability claims which may arise in connection with its operations under this permit, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts of liability limits of the third-party liability insurance provided, and (2) shall not provide foreign air transportation of persons unless there is in effect liability insurance sufficient to cover the obligations assumed in CAB Agreement 18900, and unless there is on file with the Docket Section of the Board a statement showing the name and address of the insurance carrier and the amounts of liability limits of the passenger liability insurance provided. Upon request the Board may authorize the holder to supply the name and address of

an insurance syndicate in lieu of the names and addresses of the member insurers.

The initial tariff filed by the holder shall not set forth rates, fares and charges lower than those that may be in effect for any U.S. air carrier in the same foreign air transportation; However, this limitation shall not apply to a tariff filed after the initial tariff regardless of whether this subsequent tariff is effective before or after the introduction of the authorized service.

By accepting this permit the holder waives any right it may possess to assert any defense of sovereign immunity from suit or any action or proceeding instituted against the holder of any court or other tribunal in the United States (or its territories or other possessions) based upon any claim arising out of operations by the holder under this permit.

The exercise of the privileges granted here shall be subject to such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This permit shall be effective on June 19, 1978. Unless otherwise terminated at an earlier date pursuant to the terms of any applicable treaty, convention, or agreement, this permit shall terminate (1) upon the effective date of any treaty, convention, or agreement, or amendment thereto, which shall have the effect of eliminating the routes here authorized from the routes which may be operated by Airlines designated by the Government of Mexico (or in the event of the elimination of any part of a route or routes here authorized, the authority granted shall terminate to the extent of such elimination), or (2) upon the effective date of any permit granted by the Board to any other carrier designated by the Government of Mexico in lieu of the holder hereof, or (3) upon the termination or expiration of the Air Transport Services Agreement between the Government of the United States and the Government of Mexico, effective August 15, 1960, as amended and extended: Provided, however, That if prior to the occurrence of the event specified in clause (3) of this paragraph, the operation of the foreign air transportation here authorized becomes the subject of any treaty, convention, or agreement to which the United States and Mexico are or shall become parties, then this permit is continued in effect during the period provided in such treaty, convention or agreement.

The Civil Aeronautics Board, through its Secretary, has executed this permit and affixed the seal of the Board on May 30, 1978.

PHYLLIS T. KAYLOR
Secretary

(SEAL)

Issuance of this permit to
the holder approved by the
President of the United States
on June 19, 1978
in Order 78-6-127

(2)

No. 87-2071

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID RODRIGUEZ DIAZ, *et al.*,

Petitioners,

v.

MEXICANA DE AVION, S.A., and
BOEING COMMERCIAL AIRPLANE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT COMPANIA MEXICANA DE AVIACION, S.A. DE C.V.

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Question Presented

Whether the District Court abused its broad range of discretion in conditionally dismissing the Complaint on *forum non conveniens* grounds and concluding that Mexico was an adequate and available alternative forum for the trial of this action arising from an air crash in Mexico?

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Supreme Court of the United States

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No. 87-2071

David Rodriguez Diaz, *et al.*,

Petitioners,

v.

Mexicana De Avion, S.A., and
Boeing Commercial Airplane Company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT COMPANIA MEXICANA DE AVIACION, S.A. DE C.V.

Opinions Below

The opinion of the District Court on petitioners' motion for reconsideration, which disposed of petitioners' argument that Mexico is not a suitable alternative forum, was omitted by the petitioners from their petition for a writ of certiorari. It is reprinted as an Appendix to this brief in opposition commencing at page A-26.

Statement of the Case

This is an action to recover wrongful death damages arising from an air crash disaster in Mexico on March 31, 1986. The original petitioners, representatives of sixteen Mexican citizens killed in the crash of a Mexicana flight

from Mexico City, Mexico to Puerto Vallarta, Mexico, commenced this wrongful death action against respondents Compania Mexicana de Aviacion, S.A. de C.V. a/k/a Mexicana Airlines (sued herein as Mexicana de Avion, S.A. and hereinafter Mexicana[1]) and the Boeing Airplane Company (hereinafter Boeing) in the District Court of Bexar County, Texas. (A-1; A-14). Mexicana timely removed the action to the United States District Court for the Western District of Texas based upon the provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1602 *et seq.* Petitioners then moved to file an Amended Complaint naming a United States citizen as an additional plaintiff. (A-2; A-7).

Boeing moved to dismiss the Complaint on the ground of *forum non conveniens* and for failure to state a claim upon which relief can be granted. (A-2). On January 23, 1987, the District Court, H.F. Garcia, U.S.D.J., granted Boeing's motion to dismiss the Complaint on *forum non conveniens* grounds as to both respondents. (A-1).

Petitioners then moved for reconsideration of the District Court's Order dismissing the Complaint. After further briefing and oral argument, the District Court denied the motion for reconsideration on April 17, 1987, finding that Mexico was both an available and an adequate forum. (A-26).

Petitioners then appealed to the United States Court of Appeals for the Fifth Circuit. In stressing the trial court's discretion in deciding *forum non conveniens* motions, the Fifth Circuit found that the District Court had correctly applied the "private interest" and "public interest" factors of *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and properly concluded that Mexico was the ap-

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[1] Pursuant to Rule 28.1 of the Supreme Court Rules, Mexicana states that it has the following subsidiaries:

AT, S.A. de C.V.
Transportacion Aerea Mexicana, S.A.
Datatronic, S.A. de C.V.

propriate forum for this action. (A-13 - A-20). Following affirmance of the District Court by the Fifth Circuit Court of Appeals, petitioners timely filed a petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

I

No Significant Issue Is Presented for Review by the Certiorari Petition.

The issue presented by this petition is whether the District Court abused its discretion when, after weighing all the "private interest" and "public interest" factors of *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501 (1947), it concluded that Mexico was an adequate and available alternative forum for the trial of claims arising from this air crash disaster involving an aircraft owned by a Mexican airline which crashed while on a flight between two cities in Mexico.

In the *forum non conveniens* determination, each case turns on its own facts and the District Courts are accorded substantial flexibility in evaluating a *forum non conveniens* motion. *Van Cauwenberghe* v. *Biard,* 56 U.S.L.W. 4548 (U.S. June 13, 1988) (No. 87-336). Where the District Court has considered all the relevant "private interest" and "public interest" factors, and where its balancing of these factors is reasonable, the decision of the trial court deserves substantial deference. *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 257 (1981).

The original opinion of the District Court (A-1 - A-11) and its opinion on the petitioners' motion for reconsideration (A-26), as affirmed by the Fifth Circuit, (A-13 - A-20), demonstrates that the District Court weighed all the *Gilbert* factors in reaching its conclusion that Mexico was the appropriate forum. Nothing in the opinion of the

District Court leads to the conclusion that there was an abuse of discretion by the District Court in conditionally dismissing this case to Mexico.

II

The Decision of the Court Below Is Consistent With Substantial Authority in Other Circuit Courts.

A. *The Presence of American Plaintiffs Does Not Warrant the Retention of Jurisdiction.*

Petitioners' principal argument is that the District Court should have retained jurisdiction over this action since there is an American citizen plaintiff. (Petition for Certiorari, p. 5). As the Fifth Circuit noted, however:

> . . . . the presence of a United States citizen as a plaintiff is not dispositive. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 255 n.23 (1981). The district court must, and did, weigh all the factors, giving somewhat more weight to a citizen's or resident's choice of forum than to that of a foreign plaintiff. Here, the United States citizens were far outnumbered in the class by Mexican nationals. Furthermore, they constituted one family who had moved to the United States from Mexico, and still maintained strong ties there. They were spending an extended period of time in Mexico and had bought their tickets for this internal Mexican flight in Mexico. Furthermore, their representatives were added as plaintiffs after the choice of forum had been made. Thus, we do not find that their presence in this lawsuit outweighs the district court's careful consideration of *all* the public and private interests at stake.

(A-17).

This determination is in accord with numerous other cases which, citing *Reyno*, have held that other countries

are proper alternative forums, notwithstanding the presence of a United States citizen as plaintiff. *See, e.g., Kryvicky* v. *Scandinavian Airlines System*, 807 F.2d 514 (6th Cir. 1986); *Pacific Employers Insurance Co.* v. *M/V Capt. W.D. Cargill*, 751 F.2d 801 (5th Cir.), *cert. denied*, 474 U.S. 909 (1985); *Diatronics* v. *Elbit Computers, Ltd.*, 649 F. Supp. 122 (S.D.N.Y. 1986), *aff'd*, 812 F.2d 712 (2d Cir. 1987); *Pain* v. *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981); *Nai-Chao* v. *Boeing Co.*, 555 F. Supp. 9 (N.D. Cal. 1982), *aff'd sub nom. Cheng* v. *Boeing Co.*, 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983).

Petitioners' reliance on *Schexnider* v. *McDermott International, Inc.*, 817 F.2d 1159 (5th Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 488 (1987) for the proposition that the District Court did not give proper deference to the United States citizenship of one of the plaintiffs is misplaced. In *Schexnider*, the Court held that the district court abused its discretion in dismissing the suit on *forum non conveniens* grounds because "the private and public interest factors" did not clearly establish that Australia was a suitable alternative forum. *Schexnider*, 817 F.2d at 1163. Specifically, the Court held that the appellees did not establish that a trial in Louisiana would be of great inconvenience:

> From the record, we observe that the appellees were apparently ready and able to have their case tried in Lake Charles [Louisiana]. At least in a few instances, the trial date in this case was reset on Schexnider's motion, not the appellees'.

Schexnider, 817 F.2d at 1163. The Court relied on the fact that extensive pretrial proceedings had taken place in the case over a five year period in concluding that the public interest factors also pointed to the United States as the convenient forum. *Id.*

None of the factors compelling reversal in *Schexnider* are present in this case. The *Schexnider* decision was based on the advanced stage of the litigation at the time the *forum non conveniens* motion was made. There were no extensive pretrial proceedings in this matter and both respondents promptly moved for dismissal in the District Court. (A-1; A-2).

B. *The Presence of Some Evidence in the United States Does Not Warrant Retention of Jurisdiction.*

The District Court correctly concluded that the majority of the sources of proof on both liability and damage issues are more readily available in Mexico than in the United States. (A-7; A-9; A-16). Even when relevant evidence is located in the United States, dismissal is appropriate if a larger proportion of relevant evidence is located in the foreign jurisdiction. *See, e.g., Piper Aircraft Co.* v. *Reyno,* 454 U.S. at 257-258.

In this case, relevant evidence concerning potential liability is located predominantly in Mexico. Among the significant sources of proof located in Mexico is the work product of the Mexican accident investigation, including the records of the accident aircraft; statements of eyewitnesses and air traffic controllers; the wreckage and other physical evidence from the crash site; results of tests performed on aircraft components; and the records relating to communications between the Mexicana flight crew and air traffic controllers. (A-7; A-8). Additionally, since most petitioners are Mexican citizens, evidence and witnesses concerning damage issues would also be located in Mexico. (A-9).

The fact that evidence concerning the design and manufacture of the aircraft is located in the United States does not support petitioners' argument that the District Court abused its discretion in conditionally dismissing the action. *See Jennings* v. *Boeing Co.,* 660 F. Supp. 796 (E.D. Pa.

1987), *reh'g granted,* 677 F. Supp. 803 (E.D. Pa. 1987), *aff'd,* 838 F.2d 1206 (3d Cir. 1988); *Nai-Chao* v. *Boeing Co.,* 555 F. Supp. 9 (N.D. Cal. 1982), *aff'd sub nom. Cheng* v. *Boeing Co.,* 708 F.2d 1406 (9th Cir.), *cert. denied,* 464 U.S. 1017 (1983); *Rubinstein* v. *Piper Aircraft Corp.,* 587 F. Supp. 460 (S.D. Fla. 1984). In *Nai-Chao* v. *Boeing, supra,* the court relied on the fact that the majority of the evidence was located in Taiwan, where the crash occurred and dismissed the Complaint even though evidence relating to design and manufacture of the aircraft was located in the United States. *Nai-Chao* v. *Boeing Co.,* 555 F. Supp. at 17-18.

C. *Mexico Is Both an Available and an Adequate Alternate Forum.*

Petitioners omit from their Appendix the Order of the District Court dated April 17, 1987 (A-26) which disposes of petitioners' argument that Mexico is not both an adequate and an available forum.

> Plaintiffs also argue that a remedy in a Mexican forum would not be adequate. Prior to filing their motion for reconsideration, plaintiffs did not contend that Mexican law would make a Mexican forum inadequate. They now claim that litigation in Mexico would last 4 to 6 years because the Mexican government owns the majority of the shares of Mexicana, that there is no cause of action in Mexico against Boeing, and that the recovery against Mexicana is severely limited. The affidavit of Javier Quijano Baz, a lawyer and the president of the Mexican Bar Association, refutes these contentions. He concludes that litigation of this case in Mexico would last 2 to 3 years, an optimistic length of time were the case to remain here. He also testifies that plaintiffs have causes of action against Boeing and Mexicana in Mexico for negligence and strict liability, respectively. Against Boeing, plaintiffs can recover moral damages and economic losses. The

> monetary recovery against Mexicana though less than that available in the United States, is not inadequate. If plaintiffs prove reckless and wanton conduct, it is unlimited. The fact that damages may be limited and that there is no strict liability cause of action against Boeing does not make a remedy in Mexico inadequate. *Piper Aircraft Company* v. *Reyno,* 454 U.S. 235, 254-255, 102 S.Ct. 252, 265, 70 L.Ed.2d 419 (1981). Plaintiffs' fear that a judgment would not be collectible is without merit. Both defendants are insured and have agreed to satisfy any judgment rendered in a Mexican Court. This Court remains convinced that an adequate and available alternative forum exists. The Court has considered all of plaintiffs' arguments and finds them to be without merit.

(A-26; A-27).

The existence of an available and adequate alternative forum is a threshold prerequisite for application of the *forum non conveniens* doctrine. *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 254 n.22 (1981); *In re Air Crash Disaster Near New Orleans, La.,* 821 F.2d 1147, 1164 (5th Cir.), *petition for cert. filed sub nom. Pan American World Airways, Inc.* v. *Lopez,* 56 U.S.L.W. 3369 (U.S. Nov. 6, 1987) (No. 87-750). A foreign country forum is available when the entire case and all parties can come within the jurisdiction of that forum. *In re Air Crash Disaster Near New Orleans, La.,* 821 F.2d at 1165. The foreign country forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they might not enjoy the same benefits as they receive in an American court. *In re Air Crash Disaster Near New Orleans, La.,* 821 F.2d at 1165.

The District Court considered the evidence and correctly determined that Mexicana and Boeing would be amenable to jurisdiction in Mexico. (A-3; A-10; A-11). The District Court eliminated the possibility that the foreign forum would be unavailable by expressly conditioning dismissal

on Mexicana and Boeing agreeing to 1) accept process and submit to Mexican jurisdiction; 2) waive any statute of limitations defense matured since the commencement of this action; 3) make available all witnesses and documents in the Mexican proceeding; and 4) satisfy any final judgment entered by the Mexican courts. (A-10; A-11). Such conditions are those customarily employed by the Courts in granting a *forum non conveniens* dismissal, *see e.g. Gonzalez* v. *Naveira Neptuno, A.A.*, 832 F.2d 876 (5th Cir. 1987); *Lacey* v. *Cessna Aircraft Co.*, 674 F. Supp. 10 (W.D. Pa. 1987) and use of such a conditional order of dismissal eliminates any question about the amenability of Mexicana and Boeing to suit in Mexico. *See Veba-Chemie A.G.* v. *M/V Getafix*, 711 F.2d 1243, 1245 (5th Cir. 1983). Under a *forum non conveniens* analysis, "it is relevant only that the alternative forum be available at the time of dismissal so that plaintiff may pursue his action in what has been determined to be a substantially more convenient forum." *Veba-Chemie A.G.* v. *M/V Getafix*, 711 F.2d at 1248.

Syndicate 420 at Lloyd's London v. *Early American Insurance Co.*, 796 F.2d 821 (5th Cir. 1986), cited by petitioners, is inapposite. In *Syndicate 420*, the court, while affirming the rule of *Veba-Chemie*, went one step further and modified the District Court's order of dismissal to further condition dismissal on the foreign court's willingness to permit parties other than *Syndicate 420* to intervene in the London action. *Syndicate 420*, 796 F.2d at 830.

Boeing's consent to the jurisdiction of the Mexican courts satisfies the requirement that an alternative forum be available. *Coakes* v. *Arabian American Oil Co.*, 831 F.2d 572 (5th Cir. 1987); *Veba-Chemie A.G.* v. *M/V Getafix*, 711 F.2d at 1249. As the Court stated in *Vaz Borralho* v. *Keydril Co.*, 696 F.2d 379 (5th Cir. 1983):

> A defendant's agreement to submit to the jurisdiction of the foreign forum, along with a conditional dismissal, "obviates the need for extensive inquiry into

> foreign jurisdictional law since, if the foreign court refuses to take jurisdiction, 'plaintiff is still protected by the conditional nature of the dismissal.'" *Calavo Growers of Cal.* v. *Belgium*, 632 F.2d 963, 968 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084, 101 S.Ct. 871, 66 L.Ed.2d 809 (1981). This is implicit in *Chiazor*, 648 F.2d at 1020. To the same effect is *In Re Disaster at Riyadh Airport Saudi Arabia*, 540 F. Supp. 1141, 1145 (D.D.C. 1982).

Vaz Borralho v. *Keydril Co.*, 696 F.2d at 392 n.12.

Petitioners argue that the codified nature of Mexican damage law means that they will recover less money in Mexico than they would if the case were tried in the United States, assuming that United States damage law would be applicable. A remedy is not considered inadequate merely because the monetary damages awarded in the alternative forum may be smaller. *See Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 255; *Ahmed* v. *Boeing Co.*, 720 F.2d 224, 226 (1st Cir. 1983); *In re Disaster at Riyadh Airport, Saudi Arabia on August 19, 1980*, 540 F. Supp. 1141, 1145 (D.D.C. 1982). The District Court considered the evidence submitted by the parties and concluded that the Mexican remedies were adequate. (A-26; A-27).

The possibility of an unfavorable change in law does not mandate retaining jurisdiction. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 250; *Syndicate 420 at Lloyd's London* v. *Early American Insurance Co.*, 796 F.2d 821, 829 (5th Cir. 1986). In *Reyno* the Court recognized that there may be circumstances in which the remedy afforded by the foreign jurisdiction would be so clearly inadequate or unsatisfactory "that dismissal would not be in the interest of justice". *Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 254. Those circumstances, however, do not arise unless a party "will be deprived of any remedy or [will be] treated unfairly." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 255. Clearly, those circumstances do not exist here.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

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Certificate of Service

I hereby certify that I have this 14th day of July, 1988 served three copies of the foregoing Brief in Opposition of respondent Compania Mexicana De Aviacion, S.A. De C.V. to the Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit upon petitioners by depositing same in a United States mailbox at 1251 Avenue of the Americas, New York, New York 10020, with first class postage pre-paid to:

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APPENDIX

APPENDIX

Order of United States District Court
(Filed April 17, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
SA-86-CA-1065

DAVID RODRIGUEZ DIAZ, *et al.*,
Plaintiffs,

VS.

MEXICANA DE AVION, S.A., and
BOEING COMMERCIAL AIRPLANE COMPANY,
Defendants.

ORDER

On the 10th day of April, 1987, came on to be heard plaintiffs' motion for reconsideration of this Court's Order of January 23, 1987 dismissing this cause of action based upon forum non conveniens. After consideration of the argument of counsel and the respective briefs of the parties, the Court remains convinced that dismissal was appropriate.

Plaintiffs complain that they were deprived of discovery on the forum non conveniens issue prior to entry of the Order. The record reveals that the motion to dismiss was filed November 12, 1986. Shortly thereafter, plaintiffs requested leave to submit in excess of twenty interrogatories to defendants but did not assert the pending motion

as a basis for the additional discovery. On December 5th, Boeing filed a motion to stay discovery. The motion sought a restraint of discovery as to plaintiffs' substantive claims but not as to the forum non conveniens issue. In fact, counsel for Boeing offered to arrange for the deposition of a witness on this issue. Plaintiffs' memorandum in opposition to Boeing's motion to dismiss, filed almost two months after the motion and well beyond the ten day limit set in the Local Rules, made no mention of the need for discovery. Plaintiffs have never moved to compel the answers to any interrogatories or the production of any documents related to the forum non conveniens issue. Their complaint regarding the denial of discovery is without merit.

Plaintiffs also argue that a remedy in a Mexican forum would not be adequate. Prior to filing their motion for reconsideration, plaintiffs did not contend that Mexican law would make a Mexican forum inadequate. They now claim that litigation in Mexico would last 4 to 6 years because the Mexican government owns the majority of the shares of Mexicana, that there is no cause of action in Mexico against Boeing, and that the recovery against Mexicana is severely limited. The affidavit of Javier Quijano Baz, a lawyer and the president of the Mexican Bar Association, refutes these contentions. He concludes that litigation of this case in Mexico would last 2 to 3 years, an optimistic length of time were the case to remain here. He also testifies that plaintiffs have causes of action against Boeing and Mexicana in Mexico for negligence and strict liability, respectively. Against Boeing, plaintiffs can recover moral damages and economic losses. The monetary recovery against Mexicana though less than that available in the United States, is not inadequate. If plaintiffs prove reckless and wanton conduct, it is unlimited. The fact that damages may be limited and

that there is no strict liability cause of action against Boeing does not make a remedy in Mexico inadequate. *Piper Aircraft Company* v. *Reyno*, 454 U.S. 235, 254-255, 102 S.Ct. 252, 265, 70 L.Ed.2d 419 (1981). Plaintiffs' fear that a judgment would not be collectible is without merit. Both defendants are insured and have agreed to satisfy any judgment rendered in a Mexican Court. This Court remains convinced that an adequate and available alternative forum exists. The Court has considered all of plaintiffs' arguments and finds them to be without merit.

It is, therefore, ORDERED that plaintiffs' motion for reconsideration is DENIED.

SIGNED this 17th day of April, 1987.

/s/ H.F. GARCIA
H.F. GARCIA
United States District Judge

(3)

No. 87-2071

In The

Supreme Court of the United States

October Term, 1988

David Rodriguez Diaz, et al.,

Petitioners,

v.

Mexicana De Avion, S.A., and
Boeing Commercial Airplane Company,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

By affirming the district court's discretionary decision to dismiss the plaintiffs' claims on the ground of forum non conveniens, did the court of appeals depart so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

PARTIES

Petitioners' identification of the parties to this appeal is correct except that respondent The Boeing Company ("Boeing") is misidentified as "Boeing Commercial Airplane Company."

STATEMENT TO COMPLY WITH RULE 28.1

Boeing has the following subsidiaries that are not wholly owned: ARGOSystems, Inc.

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The Appendix to the Petition for a Writ of Certiorari omits the unpublished opinion of the United States District Court for the Western District of Texas, San Antonio Division, denying plaintiffs' motion for reconsideration, which was entered by the Honorable H.F. Garcia on April 17, 1987. The text of that opinion is set forth in the Appendix to this Brief in Opposition.

STATEMENT OF THE CASE

1. *The Accident*

This lawsuit arose out of the March 31, 1986 crash of Mexicana Flight 940. The crash occurred approximately twenty-one minutes after the airplane had departed Mexico City en route for its first scheduled stop, Puerto Vallarta. The crash site was in the mountains about sixty miles west of Morelia, the capital city of the Mexican state of Michoacan. The airplane, a Boeing 727, was under the direction of Mexican air traffic control when the accident occurred.

2. *The Investigation*

The post-accident investigation was conducted by Mexican government authorities, in accordance with applicable international treaties. The Direccion General de Aeronautica Civil ("DGAC"), which is headquartered in Mexico City, placed Ing. Inrique Mendez Fernandez in charge of the investigation. Representatives of the United States National Transportation Safety Board ("NTSB"), the airline ("Mexicana") and the airplane manufacturer

("Boeing") visited the scene of the crash and provided technical information as requested by the DGAC investigators. The NTSB's role was limited, and that agency has no plans to issue a report on the accident.

Virtually all of the evidence and information gathered in the course of the DGAC investigation is located in Mexico. This includes statements taken from eyewitnesses; audio tapes and transcripts of the air traffic controllers' communications with the flight crew; the aircraft wreckage and other physical evidence from the crash site; readouts from the aircraft's cockpit voice recorder and flight data recorder; reports on the results of tests performed on salvaged components; and airline and Mexican government records concerning aircraft operation, maintenance, and flight crew and mechanic training.

The only aspect of the investigation that occurred outside Mexico was the evaluation of several pieces of wreckage by B.F. Goodrich in Ohio and by Boeing in Washington. These evaluations were carried out at the request and under the direction of the Mexican DGAC.

The DGAC issued a formal, public report on the results of its investigation late in May, 1987. The DGAC investigators concluded that the crash resulted from an inflight fire caused by the explosion of an overheated tire. In the course of the investigation, it was discovered that Mexicana had been inflating all its airplane tires with dry air, which contains oxygen and will support combustion, rather than with nitrogen, which has been recommended by Boeing since 1974 because it is inert. Mexicana procedures were amended to conform with Boeing's tire inflation recommendations shortly after the accident.

3. *The Lawsuit*

This action was originally commenced in state court in Bexar County, Texas, by the personal representatives of sixteen Mexican nationals who died in the crash. All the plaintiffs were citizens and residents of Mexico. Named as defendants were Mexicana, which is based in Mexico and owned by the Mexican government, and Boeing, a Delaware corporation with its principal place of business in the State of Washington.

Mexicana removed the case to federal court, pursuant to the Foreign Sovereign Immunities Act, and filed a motion to dismiss on the ground that it was immune from suit as a foreign sovereign. Plaintiffs opposed that motion and moved to amend their complaint to add claims on behalf of four additional decedents, all members of the Rivaud family, who were alleged to be American citizens.[1] When Boeing was served shortly thereafter, it immediately moved to dismiss the action on the ground of forum non conveniens.

On January 23, 1987, the district court granted plaintiffs' motion to amend the complaint to add claims on behalf of the Rivauds and dismissed the action, in its

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[1] Mr. and Mrs. Rivaud were born in Mexico and, according to their Mexican death certificates, maintained a residence there at the time of their deaths. Mr. Rivaud was a naturalized U.S. citizen and his wife was a Mexican citizen with resident alien status in the United States. Their two children apparently were dual nationals. The family was on an extended visit to Mexico when the accident occurred.

entirety, on the ground of forum non conveniens.[2] The dismissal was made subject to the following conditions: (1) that defendants submit to service of process and jurisdiction in the appropriate court in Mexico; (2) that defendants formally waive in the Mexican proceeding any statute of limitations defense that had matured since the commencement of this action; (3) that defendants make available all relevant witnesses and documents; and (4) that defendants agree to satisfy any judgment rendered by the Mexican court. The district court premised its decision on a careful balancing of the public and private interest factors identified in this Court's opinion in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947).

Plaintiffs moved the district court for reconsideration of its January 23, 1987 decision, relying upon several new arguments. In particular, plaintiffs argued that no adequate remedy was available in the Mexican courts and that any award obtained there would be difficult or impossible to enforce. The district court considered these new arguments, and the new evidence tendered to support them, and found them all to be without merit.[3]

Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit, which held that the forum non conveniens dismissal was within the district court's

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[2] The court denied without discussion Mexicana's motion to dismiss under the Foreign Sovereign Immunities Act.

[3] The text of this Order, entered on April 17, 1987, is set forth in the Appendix.

discretion and affirmed. The court of appeals determined that its opinion should not be published, pursuant to Local Rule 47.5, because "[t]he publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession."

REASONS FOR DENYING THE WRIT

Boeing respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the court of appeals' decision in this case because:

(1) the question presented in the Petition does not satisfy any of the criteria for review on certiorari under Rule 17.1, and

(2) the court of appeals was entirely correct in its holding that the forum non conveniens dismissal below was within the sound discretion of the district court.

I. THE PETITION FAILS TO IDENTIFY ANY ISSUE WORTHY OF THIS COURT'S REVIEW ON CERTIORARI.

Supreme Court Rule 17.1 identifies the considerations which may render a particular matter appropriate for this Court's review on certiorari. The Petition makes no attempt to bring this case within the purview of that Rule. Petitioners identify no decision by another federal

court of appeals which conflicts with the decision below.[4] Nor do they identify an important federal question which was decided below in a way that conflicts with applicable decisions of this Court or of any state court of last resort. Instead, they merely urge this Court to review the facts in the record and second-guess the trial court's discretionary application of the well-settled doctrine of forum non conveniens.

This Court should not involve itself in policing routine exercises of discretion in the lower courts unless, in the terms of Rule 17.1, such a court "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Not only did the courts below not depart in such a fashion from the accepted course of judicial proceedings in this case, they adhered scrupulously to the well-settled principles of forum non conveniens which this Court established more than forty years ago. *See Gulf Oil Corp., supra*. For this reason alone, the question petitioners have presented for review is not worthy of this Court's attention.

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[4] Petitioners claim the decision below is inconsistent with other decisions in the Fifth Circuit. Even if this were true, and Boeing submits that it is not, resolution of perceived conflicts within a single circuit has never been recognized as an appropriate reason for granting a writ of certiorari. The Fifth Circuit has its own means of resolving conflicts which may arise between decisions of separate panels.

II. THE COURT OF APPEALS WAS CORRECT IN DECLINING TO SUBSTITUTE ITS JUDGMENT FOR THE JUDGMENT OF THE DISTRICT COURT IN AN AREA THAT IS PROPERLY COMMITTED TO THE DISTRICT COURT'S SOUND DISCRETION.

The application of the doctrine of forum non conveniens in a particular case is a matter properly committed to the trial court's discretion. Where the trial court has considered the relevant public and private interest factors, and balanced them against one another in a reasonable fashion, its decision is entitled to "substantial deference." *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). The role of the court of appeals in reviewing such a decision is limited to determining whether there has been "a clear abuse of discretion." *Id.*

The court of appeals performed its function below exactly as this Court has prescribed, and it properly concluded that the trial court's discretionary balancing of the public and private interest factors relevant to the forum non conveniens inquiry should not be disturbed. The petitioners fail to identify a single reason why this Court should undertake a similar review now, except that they disagree with the conclusion reached by the district court. The conclusion itself is the only thing the petitioners can challenge, because they cannot challenge the legal standard the court applied. That legal standard, taken essentially verbatim from this Court's decisions in *Gulf Oil Corp.* and *Piper Aircraft Co., supra,* calls for the district court to weigh the evidence relating to a specified set of public and private interest factors.

The overwhelming weight of the evidence bearing on these public and private interest factors pointed to Mexico as the most convenient forum in which to fairly and efficiently resolve the merits of the plaintiffs' claims. Factors which properly influenced the lower court's decision included the following:

1. The Mexican forum is available because both defendants have agreed to waive any jurisdictional objections and to honor any adverse judgment rendered by a Mexican court.

2. The Mexican forum is adequate because Mexican law provides a cause of action against both the airline, Mexicana, and the manufacturer, Boeing. The applicable provisions of Mexican substantive law were proved below through an affidavit submitted by the President of the Mexican Bar Association.

3. Plaintiffs' damage claims will be governed by Mexican law, under applicable choice of law rules, whether they are tried in Mexico or in Texas. The Mexican courts are obviously more familiar with substantive Mexican law than a federal court in Texas would be.

4. The goal of resolving disputes of predominantly local interest in a local court can be achieved only if the case is tried in Mexico.

5. Most of the physical evidence relevant to the accident is located in Mexico, and could not be reached by judicial process if this case were to be litigated in Texas. Accordingly, not only would trial in Mexico be convenient, but it would ensure fundamental fairness by affording all parties equal access to the evidence.

6. No witnesses, documents or other items of evidence pertinent to this lawsuit can be found anywhere in the State of Texas. As the district court

> astutely observed, the only link between this lawsuit and the State of Texas is the fact that the plaintiffs' counsel maintains his office there.

None of the plaintiffs' countervailing arguments merits consideration beyond that already given them by the court of appeals. Contrary to the impression conveyed by the Petition, the presence of American citizen plaintiffs is not dispositive in a forum non conveniens inquiry. *See Piper Aircraft Co.*, 454 U.S. at 255 n.23. Similarly, the fact that evidence relevant to Boeing's manufacture of the airplane is located in Seattle does not compel the conclusion that the case must be tried in the United States. *See, e.g., Nai-Chao v. Boeing Co.*, 555 F. Supp. 9, 17-18 (N.D. Cal. 1982), *aff'd*, 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983). This is especially true where Boeing has agreed to provide witnesses and documents in Mexico. Finally, the possibility that Mexican law may be less favorable to plaintiffs than Texas law is not a reason for denying a forum non conveniens motion. *Piper Aircraft Co.*, 454 U.S. at 250.

In short, no aspect of the lower court's handling of the forum non conveniens issue departed in any way from the accepted and usual course of judicial proceedings. The court of appeals' affirmance of the district court's forum non conveniens dismissal called for no more than the application of well-settled principles of law to the facts of a particular case.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DAVID RODRIGUEZ DIAZ, et al, Plaintiffs vs. MEXICANA DE AVION, S.A., and BOEING COMMERCIAL AIRPLANE COMPANY, Defendants	*	SA-86-CA-1065 (Filed April 17, 1987)

ORDER

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available in the United States, is not inadequate. If plaintiffs prove reckless and wanton conduct, it is unlimited. The fact that damages may be limited and that there is no strict liability cause of action against Boeing does not make a remedy in Mexico inadequate. *Piper Aircraft Company v. Reyno*, 454 U.S. 235, 254-255, 102 S.Ct. 252, 265, 70 L.Ed.2d 419 (1981). Plaintiffs' fear that a judgment would not be collectable is without merit. Both defendants are insured and have agreed to satisfy any judgment rendered in a Mexican Court. This Court remains convinced that an adequate and available alternative forum exists. The Court has considered all of plaintiffs' arguments and finds them to be without merit.

It is, therefore, ORDERED that plaintiff's motion for reconsideration is DENIED.

SIGNED this 17th day of April, 1987.

/s/ H.F. Garcia
H.F. GARCIA
UNITED STATES DISTRICT JUDGE